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DA 95-718

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554**

In the Matter of)	
)	
Application of Open Network)	CC Docket No. 92-256
Architecture and Nondiscrimination)	
Safeguards to GTE Corporation)	

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 1995 Released: April 3, 1995

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. GTE Corporation and its affiliates ("GTE") have petitioned the Commission to waive the requirements that it file state and federal Open Network Architecture ("ONA") tariffs on April 4, 1995.¹ Specifically, GTE asked the Commission: (1) to defer the federal ONA tariff filing deadline until 30 days after the effective date of the 1995 Annual Access filings, and (2) to extend the due date for filing the state ONA tariffs until 30 days after the effective date of the federal ONA tariffs. In addition, GTE requested an extension until March 30, 1996, to file its first semi-annual tariff report. In this Memorandum Opinion and Order, we grant GTE's waiver requests, subject to the condition that GTE file illustrative tariffs by April 30, 1995.

II. BACKGROUND

2. On April 4, 1994, the Commission extended to GTE the regulatory framework of Open Network Architecture ("ONA") and nondiscrimination safeguards that apply to the Bell Operating

¹ Application of Open Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, GTE's Petition for Waiver of the Requirement to File Intrastate ONA Tariffs Concurrently with Federal ONA Tariff Filings, filed on Jan. 4, 1995 (GTE State Tariff Waiver Petition); GTE's Petition for Waiver of Certain ONA Filing Requirements, filed on Mar. 2, 1995 (GTE Federal Tariff Waiver Petition).

Companies ("BOCs").² The Commission, inter alia, required GTE to submit an ONA plan on January 4, 1995; to file federal and state ONA tariffs on April 4, 1995; and to implement ONA requirements and nondiscrimination safeguards by July 4, 1995.³

3. On January 4, 1995, GTE filed its ONA plan with the Commission.⁴ In its Plan, GTE set forth its initial ONA service offerings, and described its proposed deployment of these services. GTE also described how it proposed to comply with the Commission's CEI requirements, which is required as a component of the ONA plan, and to implement the nondiscrimination safeguards.

4. At the time it submitted its ONA plan, GTE also petitioned the Commission to waive the requirement that it file state ONA tariffs on April 4, 1995, concurrently with the federal ONA tariffs.⁵ In its petition for waiver, GTE requested permission to file the state ONA tariffs within thirty days after the effective date of the federal tariffs.⁶

² Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, 9 FCC Rcd 4922 (1994) (GTE ONA Order). Under the Commission's comparably efficient interconnection ("CEI") requirements, the basic services used by a carrier's own enhanced service operations must be available to other enhanced service providers ("ESPs") in an equally efficient manner. See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958, 1035-36, para. 147 (Phase I Order), recon., 2 FCC Rcd 3035 (1987), further recon., 3 FCC Rcd 1135 (1988), further recon., 3 FCC Rcd 1135 (1988), second further recon. 4 FCC Rcd 5927 (1989), rev'd on other grounds sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990). ONA expanded the CEI concept beyond its service specific emphasis to require the carrier to "unbundle key components of its basic services and offer them to the public under tariffs, regardless of whether [the carrier's own] enhanced services utilize the unbundled components." Phase I Order, 104 FCC 2d at 1018, 1019-20, para. 113. The nondiscrimination safeguards include rules governing the use of customer proprietary network information, access to operations support systems, the disclosure of network information, and nondiscrimination in installation and maintenance. See GTE ONA Order, 9 FCC Rcd at 4941-4952, paras. 36-64.

³ Id. at 4923, para. 1; 4954, paras. 71-73.

⁴ Application of Open Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, GTE's Open Network Architecture Plan, filed on Jan 4, 1995 (GTE ONA Plan).

⁵ GTE State Tariff Waiver Petition, supra note 1.

⁶ Id.

5. The Commission by public notice dated January 17, 1995 invited interested parties to submit comments on GTE's ONA plan and/or its state ONA tariff waiver petition.⁷ No comments were received during the comment period but the State of Hawaii ("Hawaii"), in a written ex parte pleading, subsequently filed a letter opposing the grant of the waiver as it pertains to GTE Hawaiian Telephone Company ("HTC").⁸

6. On March 2, 1995, GTE filed a petition for waiver of the April 4, 1995, deadline for filing the federal ONA tariffs.⁹ In that petition, GTE requested the Commission to defer the filing date of the federal ONA tariffs until 30 days after the effective date of its 1995 Annual Access filings. GTE also requested the Commission to extend the deadline for the filing of its first semi-annual ONA tariff report from September 30, 1995 to March 30, 1996. In addition, GTE's petition asked that the Commission defer the ONA implementation date until three months after the federal ONA tariffs are filed. In a subsequent ex parte filing, GTE clarified that apart from those obligations that require federal tariffing, it did not seek a waiver of the July 4, 1995 deadline to implement ONA requirements and nondiscrimination safeguards.¹⁰

7. On March 9, 1995, the Commission placed GTE's federal waiver petition on public notice and invited comments on this petition.¹¹ Hawaii filed a letter urging the Commission to deny the waiver with regard to HTC,¹² and GTE submitted a reply.¹³

⁷ Public Notice, Pleading Cycle Established for Comments on GTE's Open Network Architecture Plan and Waiver to File Intrastate ONA Tariffs Concurrently With Federal ONA Tariffs, DA 95-48 (Jan. 17, 1995).

⁸ Letter from Herbert E. Marks and Marc Berejka, Counsel, State of Hawaii to William F. Caton, Acting Secretary, FCC, filed by the State of Hawaii on Mar. 10, 1995 (Hawaii Letter).

⁹ GTE Federal Tariff Waiver Petition, supra note 1.

¹⁰ Letter from Edwin Shimizu, Director Regulatory Matters, GTE, to Laurel Bergold, and Rose Crellin, FCC, filed by GTE on Mar. 6, 1995 (GTE March 6 Ex Parte Letter).

¹¹ Public Notice, Pleading Cycle Established for Comments on GTE's Petition for Waiver of Certain Open Network Architecture Requirements, DA 95-454 (Mar. 9, 1995).

¹² Letter from Herbert E. Marks and Marc Berejka, Counsel, State of Hawaii to William F. Caton, Acting Secretary, FCC, filed by the State of Hawaii on Mar. 20, 1995 (Hawaii Opposition).

8. In this Memorandum Opinion and Order, we grant GTE's petitions for waiver, subject to the filing of illustrative tariffs, but generally do not address the merits of GTE's ONA Plan. We intend to consider the adequacy of that Plan in a subsequent order.

III. FEDERAL WAIVER REQUEST

9. GTE's Request. In its petition, GTE states that the federal ONA tariffs must comply with the Commission's pricing requirements relating to the creation of access charge sub-elements and cost support requirements.¹⁴ GTE maintains that one such requirement "is to establish the BSA rates by starting with the existing bundled End Office Switching ("EOS") revenues, subtracting the appropriate BSE revenue and dividing the residual revenue by the BSA units."¹⁵ GTE asserts that the EOS revenues from the Annual Access tariff filing are the starting point for developing the ONA rates.

10. GTE notes that its current deadline for the 1995 Annual Access filing is March 31, 1995 -- four days before the April 4, 1995 deadline for filing federal ONA tariffs. GTE claims that it would take enormous resources to prepare both the ONA and 1995 Annual Access tariff filings simultaneously. According to GTE, these burdens are magnified by the fact that the Commission is presently conducting a rulemaking to consider changes in the price cap rules.¹⁶ GTE argues that any changes in the price caps rules likely will require changes to the annual access tariff filings,

¹³ Reply of GTE, filed Mar. 24, 1995 (GTE Reply).

¹⁴ GTE Federal Tariff Waiver Petition, at 2.

¹⁵ Id. at 2. Basic Service Arrangements ("BSAs") are one of the four types of ONA services. The BSAs are the fundamental federally tariffed switching and transport services that permit the ESP to communicate to its customers through the exchange carrier's network. Basic Service Elements ("BSEs") are optional unbundled features that an ESP may require or find useful in configuring an enhanced service. See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 36, para. 56 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990), aff'd sub nom. California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

¹⁶ See Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994).

which in turn would mandate revisions to the ONA filings.¹⁷

11. In its opposition, Hawaii argues that GTE's request is untimely. The State maintains that GTE has known of the filing deadline since the release of the GTE ONA Order, but failed to petition the Commission to reconsider the deadline.¹⁸ In addition, Hawaii claims that the State Public Utilities Commission ("PUC") is currently conducting a far-reaching investigation of issues relating to telecommunications investment and infrastructure, including the unbundling of products and services. Hawaii notes that a hearing in that proceeding is scheduled for May, 1995 and that pre-hearing submissions are due a month earlier. Hawaii argues the Commission should require GTE to file its ONA tariffs by the original deadline so that the ONA tariffs can be considered in the Hawaii investigation.¹⁹

12. In reply, GTE denies that its waiver petition is untimely. GTE asserts that while it has known of the filing deadline since April 1994, current circumstances, such as the delay in the 1995 Annual Access filing deadline, have increased the burdens of filing the ONA tariffs by the current deadline.²⁰ In addition, GTE disputes that a delay in the filing of the GTE ONA tariff will hamper the State PUC investigation. GTE claims that, to the extent that its ONA plans are relevant to the intrastate proceeding, sufficient information on the manner in which it will implement ONA is contained in the ONA Plan on file with the Commission.²¹

13. Discussion. The Commission may waive any provision of its rules or orders if good cause is shown.²² A showing of good

¹⁷ GTE Federal Tariff Waiver Petition, at 3. GTE states that the United States Telephone Association (USTA) has petitioned the Commission to waive the deadline for the filing of the 1995 Annual Access tariff filings until 30 days after the release of the price cap order. GTE claims that if USTA's petition is granted, GTE's ONA filing would be based on pre-1995 annual access tariff filing data, and that it may have to update the ONA tariff to include the effects of the changes in new data. Id. at 3.

¹⁸ Hawaii Opposition, at 2.

¹⁹ Id. at 3.

²⁰ GTE Reply, at 2-3.

²¹ Id. at 3.

²² 47 C.F.R. § 1.3.

cause requires the petitioner to demonstrate special circumstances that warrant deviation from the rules and to show how such deviation would serve the public interest.²³ We find that GTE has made a persuasive showing to extend the filing deadline for its federal ONA tariffs until August 31, 1995.²⁴ Given the impact that changes to the annual access filings may have on the ONA tariffs, GTE has demonstrated that deferring the filing of the federal ONA tariffs until after the effective date of the 1995 Annual Access tariffs would provide for a more orderly and efficient tariff filing and review process.²⁵

14. Moreover, the Commission recently extended the deadline for the filing of the 1995 Annual Access tariffs to 30 days following the release of a decision in the price caps rulemaking, to be effective on August 1, 1995.²⁶ The filing deadline for the 1995 Annual Access tariffs, therefore, postdates the current filing deadline for the ONA tariffs. Absent the grant of GTE's waiver petition, GTE's ONA tariff filings, which will be based on pre-1995 Annual Access filing data, likely will have to be updated. Deferring the ONA filing deadline should eliminate the need for this type of tariff revision during the pendency of the tariff review process.

15. We reject Hawaii's contention that the waiver was untimely filed.²⁷ Moreover, as GTE points out, the deferral of the filing deadline for the 1995 Annual Access tariffs is an intervening event that increases the administrative burdens associated with the present ONA filing deadline.

²³ Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁴ GTE is required to file its federal ONA tariffs on three months notice. Thus, GTE's ONA tariffs must be scheduled to take effect on November 30, 1995.

²⁵ We note that on March 30, 1995, the Commission adopted a Report and Order regarding changes in price caps requirements. See Commission Affirms Commitment to Competition and Fair Long Distance Rates in LEC Price Cap Plan, March 30, 1995.

²⁶ 1995 Annual Access Tariffs, DA 95-494 (released Mar. 16, 1995) (USTA Waiver Order).

²⁷ Under the Commission's rules, the agency may issue waivers "at any time" on its own motion or upon the petition of an interested party. Thus, in contrast to a petition for reconsideration, there is no deadline for the filing of a petition for waiver.

16. We note that GTE already offers most of the federal ONA services in its ONA plan on an unbundled basis.²⁸ We conclude that the advantages of avoiding the prospect of multiple tariff revisions outweighs the short delay in the introduction of ONA services not presently available under tariff, and thus grant GTE's petition. We emphasize, however, that this waiver is limited to GTE's federal tariff filing obligation. GTE remains obligated to implement the remainder of the ONA requirements, including the non-discrimination requirements, by July 4, 1995.²⁹

17. With respect to Hawaii's interest in obtaining ONA-related information for use in the Hawaii PUC's omnibus investigation of telecommunications investment and infrastructure, GTE was required to file illustrative state and federal ONA tariffs with the Commission as part of its ONA Plan.³⁰ GTE's ONA Plan did not comply with this requirement. Such illustrative tariffs could provide Hawaii with information that might be useful in the state omnibus investigation. Thus, while we do not address generally in this Memorandum Opinion and Order the adequacy of GTE's ONA Plan, we require GTE to file with the Commission illustrative state and federal ONA tariffs by April 30, 1995.

18. In addition, we grant GTE's related request to extend the filing of the first semi-annual tariff report to March 30, 1996. In light of our decision to extend the deadline for the filing of the federal and state ONA tariffs, we believe that a corresponding extension for the filing of reports on those tariffs is warranted.

IV. STATE WAIVER REQUEST

19. GTE's Request. In support of a deferral of the state ONA filing deadline, GTE asserts that its usual practice is to file

²⁸ GTE has stated that it currently offers 10 (of 13) proposed BSAs and 21 (of 29) proposed BSEs on an unbundled basis. GTE March 6 Ex Parte Letter. BSAs and BSEs are the two types of ONA services that must be federally tariffed. See BOC ONA Order, 4 FCC Rcd at 116, para. 226.

²⁹ See GTE ONA Order, 9 FCC Rcd at 4923, para. 1. As noted above, GTE, in an ex parte letter filing clarified that it was not generally seeking an extension of the ONA deadline. See GTE March 6 Ex Parte Letter.

³⁰ In the GTE ONA Order, 9 FCC Rcd at 4953, para. 68, we required GTE to comply with the same ONA requirements that we had previously applied to the BOCs. One of those requirements was that the BOCs file illustrative federal and state ONA tariffs. See BOC ONA Order, 4 FCC Rcd at 171-73, paras. 326-30.

state access tariffs only after the federal tariffs go into effect.³¹ GTE states that the state and the federal ONA tariffs are "highly interrelated," and that mandated changes in the two federal ONA tariffs likely would result in changes in some or all of the forty-five state tariffs.³² GTE claims that by requiring the concurrent filing of state and federal ONA tariffs, state authorities would be presented with state tariffs implementing federal policy before this Commission had examined the federal tariffs. Because the state authorities likely would postpone action on the state tariffs "until the FCC has acted" on the federal ONA tariffs,³³ GTE predicts that a grant of the waiver would not delay state implementation of the ONA tariffs. GTE also claims that a grant of its waiver would permit a more precise fit between the federal and the state tariffs by eliminating any possible need for tariff revisions. Finally, GTE asserts that a waiver would permit GTE to comply with a number of state filing regulations.³⁴

20. In its ex parte letter, the Hawaii asks the Commission to deny GTE's requested waiver as applied to HTC. Hawaii contends that the initial schedule adopted by the Commission would enable Hawaii to "more actively participate (if need be) in the development of the ONA tariff" than if the filing was delayed.³⁵ In addition, Hawaii asserts that the filing deadline should not be deferred so that the ONA tariffs can be considered in the State PUC investigation of issues relating to telecommunications investment and infrastructure.

21. Discussion. We conclude that an extension of GTE's state ONA tariff filing deadline is in the public interest. The record shows that the rates and rate structures of services that GTE offers both on an interstate and intrastate basis typically are identical.³⁶ As a consequence, any mandated changes in the federal tariffs would result in comparable modifications to the state

³¹ See Letter to William F. Caton, Acting Secretary, FCC, from F. Gordon Maxson, Director-Regulatory Affairs, GTE, filed by GTE on Mar. 13, 1995 (GTE March 13 Ex Parte Filing).

³² GTE State Tariff Waiver Petition at 2. GTE asserted that it often uses, as justification, the federal tariff filing and accompanying support material. GTE March 12 Ex Parte Filing at 3.

³³ GTE State Tariff Waiver Petition at 2.

³⁴ Id. at 3.

³⁵ Hawaii Letter at 3.

³⁶ See Letter to William F. Caton, Acting Secretary, FCC, from F. Gordon Maxson, Director, Regulatory Affairs, GTE, filed on Mar. 15, 1995 (GTE March 15 Ex Parte Letter).

services. We therefore believe that deferring the state ONA filings until 30 days after the federal tariffs become effective would minimize the prospect of multiple tariff revisions during the initial tariff review process. A waiver also would permit GTE to conform to its usual state tariff filing procedures. And it would avoid any inconsistency between the federal and state filing requirements.

22. In making this determination, we have considered the possible impact of a grant of the requested state waiver on service availability. The record shows that most of GTE's proposed state ONA services currently are available in existing tariffs.³⁷ Deferring the filing of state ONA tariffs would not have a substantial effect on service availability. We note that no ESPs opposed the waiver on the grounds that it would delay the introduction of service, or for any other reason. We find that the impact of a grant of the requested waiver on service availability at most is small and temporary.³⁸

23. We note that Hawaii does not address or refute GTE's showing that the current filing dates result in an inefficient and burdensome tariff filing and review procedure. In addition, we are unpersuaded by Hawaii's contention that adherence to the Commission's initial schedule will permit Hawaii "to more actively participate (if need be) in the development of the ONA tariff than if filing is delayed."³⁹ The sole effect of the waiver is to defer the date that the state ONA tariffs are filed. The waiver has no effect on the ability of the State or any other party either to participate in state tariff proceedings or to complain to the Commission that any aspect of the state ONA tariff is inconsistent with federal policy.⁴⁰ Nor does it limit the ability of Hawaii to take any action in its investigation of telecommunications investment and infrastructure.

24. We recognize the State's concern about obtaining ONA-related information for use in the intrastate investigation. As noted above, we are requiring GTE in this Memorandum Opinion and Order to file illustrative state and federal ONA tariffs by April

³⁷ See GTE March 13 Ex Parte Filing at 1 & Att. A.

³⁸ GTE claims that the state PUCs likely will defer consideration of the state ONA tariffs until the federal ONA tariffs become effective. GTE State Waiver Petition at 2-3. If GTE's prediction is accurate, the grant of a waiver will not delay the availability of any ONA service.

³⁹ Hawaii Letter at 3.

⁴⁰ See BOC ONA Order, 4 FCC Rcd at 163, para. 312.

30, 1995. These tariffs could be useful in the intrastate investigation.


V. CONCLUSION

25. Accordingly, in this order, we grant GTE's petitions for waiver of the deadline for the filing of its federal and state ONA tariffs. GTE must file federal ONA tariffs on or before August 31, 1995, to be effective on November 30, 1995. We also defer the deadline for the filing of GTE's state ONA tariffs to 30 days after the effective date of the federal ONA tariffs. In addition, we grant GTE an extension until March 30, 1996 in which to file its first semi-annual tariff report. Finally, we require GTE to file illustrative federal and state ONA tariffs by April 30, 1995.

VI. ORDERING CLAUSE

26. IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(j), 205, 218, and Sections 0.91, 0.291, 1.1, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.1, 1.3, that GTE's petitions for waivers are granted and that GTE shall file illustrative state and federal ONA tariffs by April 30, 1995.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen M.H. Wallman
Chief, Common Carrier Bureau